WALTER J. LACK, ESQ. (SBN 57550)
wlack@elllaw.com
BRIAN D. DEPEW, ESQ. (SBN 89339)
bdepew@elllaw.com
ELIZABETH L. CROOKE (SBN 90305)
bcrooke@elllaw.com
ENGSTROM, LIPSCOMB & LACK
10100 Santa Monica Blvd., 12th Flr.
Los Angeles, CA 90067-4113
Telephone: 310-552-3800; Fax: 310-552-9434

THOMAS V. GIRARDI, ESQ. (SBN 36603)
V. ANDRÉ SHERMAN, ESQ. (SBN 198684)
GIRARDI | KEESE
1126 Wilshire Boulevard
Los Angeles, CA 90017
Telephone: (213) 977-0211; Fax (213) 481-1554

Attorneys for: Plaintiffs

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES – CENTRAL CIVIL WEST

Coordination Proceeding Special Title (Rule 3.550) **BYETTA® CASES**	**JCCP NO. 4574** Honorable William F. Highberger Coordination Judge, Dept. 322 **PLAINTIFFS' REPLY TO DEFENDANTS' RESPONSE TO REQUEST FOR ADDITIONAL BRIEFING ON THE ISSUE OF PREEMPTION**

1. SUMMARY JUDGMENT AND CLEAR EVIDENCE; RESPECTIVE BURDENS

To answer the question posed by the Court, it is helpful to revisit the context. This is a motion for summary judgment. Thus, "from commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal. 4th 826, 850. The moving party must first produce sufficient evidence to make a prima facie showing that there are no triable issues of material fact. *Id.* Only if it does so, the burden of production shifts to the opposing party to show a dispute as to a material issue of fact. *Id.* The Court reviews the evidence and inferences reasonably drawn in the light most favorable to the non-moving party. *Id.* at 843. The Court does not weigh the evidence as though it were the trier of fact; if the court concludes that the plaintiff's evidence raise a triable issue of material fact, it must conclude its consideration and deny the defendants' motion. *Id. at* 856. Presumptions (such as the presumption against preemption) are evidence, too. *Security Pac. Nat'l Bank v. Associated Motor Sales* (1980) 106 Cal.App. 3d 171, 179, *and see* Weil & Brown, Civ. Proc. Before Trial at 10:184.5.

Defendants bear both the burden of persuasion and the inital burden of production on the demanding defense of impossibility preemption. Unless Defendants have produced "clear evidence" of impossibility, *Wyeth v. Levine* (2009) 555 U.S. 555, they haven't carried their initial burden. Even if the Court concludes that they have done so, that is not the end of the inquiry; Plaintiffs then need only produce evidence to show a triable issue of material fact. While we have done this, Defendants haven't even met their initial burden because their evidence isn't clear; it relies on speculation and inference.

Courts have struggled with the meaning of "clear evidence" and Defendants' cases offer little insight on that issue. Their footnote 5 lists fourteen cases that consider the issue, and in all but two, reject the preemption defense, because the evidence of impossibility was not clear.[1] None of those cases

[1] Cases cited in Defendants' note 5 rejecting preemption are: *Aaron v. Wyeth* (W.D. Pa. 2010) 2010 U.S. Dist. LEXIS 14581 (no proof of impossibility where Wyeth did not "press its position" to change label); *Baumgardner v. Wyeth Pharm.* (E.D. Pa. 2010) 2010 U.S. Dist. LEXIS 90263 ("defendant has not shown that the FDA would not have approved a change to Effexor's label."); *Cross v. Forest Labs Inc.* (N.D. Miss. 2015) 2015 U.S. Dist LEXIS 44677 (no clear evidence that FDA would reject warning about the need to observe for precursor symptoms); *Dorsett v. Sandoz, Inc.*(C.D. Cal. 2010) 699 F.Supp.2d 1142 (theoretical possibility of rejection does not meet clear evidence standard); *Forst v SmithKline Beecham Corp.* (E.D. Wis. 2009) 639 F.Supp.2d 948 (no clear evidence that FDA would have denied enhanced warning); *Gaeta v Perrigo Pharm. Co* (9th Cir. 2011) 630 F.3d 1225 (evidence no more compelling than that rejected in *Levine*); *Hayes v. SmithKline Beecham Corp.* (N.D. Okla. 2009) 2009 U.S. Dist. LEXIS 116081 (Defendant produced no evidence that it attempted to strengthen the warning); *Koho v. Forest Labs.* (W.D.Wash. 2014) 17 F.Supp.3d 1109 (speculation about FDA's views is not clear evidence

directly address the "who decides" questions posed by this Court, nor are they suited to do so. The court in each of those cases found that defendants hadn't met their initial burden of bringing forth "clear evidence of impossibility" in the first instance, so the question of "court or jury" was not reached. A denied summary judgment doesn't answer the question of who eventually decides the facts.

Cases decided under Fed. Rule Civ. Proc. 56 shed little light on the fact-finding functions of a California state court under *C.C.P.*§437c. Judicial expressions of finality in the Rule 56 decisions suggest that the issue of preemption has been determined adversely and permanently for those defendants who didn't reach the clear evidence standard, a normal consequence of Rule 56(f), as a District Court may adjudicate an issue in favor of the non-moving party, *see, Gospel Missions of America v. City of Los Angeles* (9th Cir. 2003) 328 F.3d 548, 553. When those courts found that defendants hadn't met the clear evidence threshold, they had no occasion to confront the next question, now posed by this Court: who decides fact questions that remain?

Defendants' cases (and those previously cited by Plaintiffs) *do* brightly illuminate one path: "clear evidence" was found only in those cases in which an enhanced warning had already been sought by defendant and rejected by the FDA, or where the FDA had demanded language irreconcilably at odds with that sought by Plaintiffs.[2] Anything less than a rejected warning demands that the court draw inferences or engage in mind-reading, and in those cases cited by defendants, the courts declined the invitation to do so. Defendants' argument here that the FDA "would have rejected" a warning is a refrain heard over and over, and in the absence of an actually rejected warning, Courts have routinely refused to infer that the FDA would do so, when the standard of proof is clear evidence.

How can NEJM constitute clear evidence? A reasonable fact-finder could and likely would conclude that this statement: "The FDA and the EMA have not reached a final conclusion at this time regarding such a causal relationship" and "pancreatitis will continue to be considered a risk associated

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that warning would be rejected); *Mason v. SmithKline Beecham Corp.*(7th Cir. 2010) 596 F.3d 387 (FDA inaction in light of postmarketing and clinical reports and FDA approval of new indications for Paxil not clear evidence that FDA would reject strengthened warning); *Muzichuck v Forest Labs Inc.* (N.D. W.Va. 2015) 2015 U.S. Dist. LEXIS 5440 (preemption denied; court rejected reasoning in *Dobbs*); *Newman v. McNeil Consumer Healthcare* (N.D. Ill. 2012) 2012 U.S. Dist. LEXIS 2153(no impossibility); *Wells ex Rel. J.W. v. Allergan* (W.D. Okla. 2013) 2013 U.S. Dist. LEXIS 13191 (no clear evidence).

[2] In this category of cases are *Rheinfrank v. Abbott Labs., Inc.* (S.D. Ohio 2015) 2015 U.S. Dist. LEXIS 104564 (FDA twice rejected enhanced warning); *Dobbs v. Wyeth Pharm.* (W.D. Okla. 2011) 797 F.Supp. 1264 (FDA rejected warnings and insisted on statement that studies do not support risk in older adults); *Glynn v. Merck Sharp & Dohme (In re Fosamax Prod. Liab. Litig.)* (D.N.J. 2013) 951 F.Supp.3d 695 (FDA rejected proposed warning). In *Glynn,* the trial court awaited a complete trial record before ruling on the motion, *id.* at 700.)

with these drugs until more data are available; both agencies continue to investigate this safety signal"[3] reflect an open question, not a closed mind.[4] The "seven data points" posited during argument in truth collapse into one or two; the FDA has repeatedly expressed some variant of that same idea; "The FDA will not issue a final determination on the issues at hand until input from the advisory committee process has been considered and all reviews have been finalized."[5] Courts are rightly reluctant to read a regulatory intent into an equivocal FDA pronouncement. *See, Reid v. Johnson & Johnson* (9th Cir. 2015) 780 F.3d 952, 964-65. That the FDA had not yet been compelled to mandate a label change, whether by Citizens' Petition or other data, is a different question than whether a manufacturer could add warnings that it believes are scientifically substantiated. *Dorsett, supra,* 699 F.Supp.2d at 1157, *and see Schedin v. Ortho–McNeil–Janssen Pharms., Inc.* (D.Minn. 2011) 808 F.Supp.2d 1125, 1133. Manufacturers' proposals are often greeted differently, and with favor, as part of the long back-and-forth with the FDA that characterizes every single cited case starting with *Levine* – that is, every case except this one. NEJM's clipped remarks leave unexplained the exhaustive back story every other case found to be important, because the clear evidence standard demands such a "necessarily fact specific" inquiry. *Fosamax*, supra, 951 F.Supp.2d at 703.

The common factor in Defendants' summary judgment cases is that the proposed warning language was before the Courts. The language drove the decisions; the words themselves mattered. In contrast, it is undisputed that no language for an enhanced warning (or other means of communicating risk) has been suggested. How could a Court rule on language not before it—unless it finds clear evidence that the FDA would have rejected any possible warning or alert, even listing pancreatic cancer in the adverse reaction section? This Court's own questions both before and during argument hint at the conclusion that facts like these are readily susceptible to a reasonable interpretation against preemption.

In *Reckis v. Johnson & Johnson* (Mass. 2015) 28 N.E.3d 445, 459, cited by Defendants, the court observed that it "is anybody's guess" what the FDA would do with a label listing understandable symptoms, and therefore not "clear evidence" where the FDA rejected different, overly-technical

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[3] Egan, Amy, et al., Pancreatic Safety of Incretin-Based Drugs – FDA and EMA Assessment, (Feb. 2014) Vol. 370 N Eng J Med pp. 794-97 ("NEJM"), Defendants' Exh. A to Laurendeau declaration to original motion.

[4] By contrast, when the FDA completes a review, the extensive and unambiguous analysis is typically published. An example: 154 page review, http://www.fda.gov/ohrms/dockets/ac/08/briefing/2008-4372b1-01-FDA-Katz.pdf

[5] Exhibit 35 to Depew Declaration to original opposition.

language. The Court added that FDA's response to a citizen petition "would not answer whether the FDA would have rejected the warning had it been sought by the defendants themselves." *Id. Reckis* denied preemption on stronger evidence than that proffered by Defendants here.

"Clear" means "transparent."[6] And Judge Battaglia said it himself: "The Court: But they are never going to be completely transparent. The FDA is the government." Transcript, September 11, 2015 at p. 126:15–16. And when Defendants propose to carry their burden by way of inferences drawn from ambiguous remarks, they fail.[7]

Defendants' argument would dramatically undermine *Levine's* threshold of clear evidence so that FDA's assent to a label is enough to establish that it is impossible to enhance that label. The fallacy in that argument is that it undercuts the very core of *Levine*, which is that labeling standards are merely a "floor upon which States could build." 555 U.S. at 579.

Carefully edited snippets from Dr. Fleming's deposition don't stand for the conclusions Defendants draw and don't help them carry their burden. For instance, his agreement that NEJM's reported review in part considered the adequacy of the label tells us nothing about whether the FDA would reject a properly supported CBE, especially given that the FDA preserved the pancreatitis warning. He agreed NEJM literally says what it says, that the quotes were read accurately, not that in his opinion the data don't support an enhanced label.[8] He made clear the difference between a manufacturer-proposed change (typically viewed with favor) and an FDA mandated change.[9]

2. MIXED QUESTION OF LAW AND FACT

Defendants misconstrue plaintiffs position on whether preemption raises an issue for the Court alone; we argued not that the jury *alone* decides, but rather that there are fact questions implicit in impossibility. Why would *Levine* demand clear evidence, and *Levine's* progeny refer to the "necessarily

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[6] Merriam-Webster Dictionary New Edition.

[7] That "clear and convincing" evidence is an extraordinarily difficult threshold to prove on motion is demonstrated in *Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244 (plaintiffs failed to establish malice by clear and convincing evidence and thus could not overcome summary judgment).

[8] *Contrast* Ex. 48 to Depew Decl. to original opposition, Fleming Dep. 107:2–6 with 195:13–196:6, 198:10–199:1; 204:24–206:6. For instance Defendants equate the question and answer beginning with "Do you read the New England Journal of Medicine conclusions from the FDA to mean that the FDA has decided . . . ." to represent Dr. Fleming's own opinion, something he simply did not say. *Id.* 153:11–19.

[9] Defendants asked a different question than whether a manufacturer's proposed label enhancement would be rejected. Dr. Fleming explained the difference between a manufacturer proposal and an FDA mandate. *Id.* at 205:16—206:6

fact specific"[10] task? What we do contend is that impossibility preemption raises mixed questions of law and fact, and *Levine* has already established the fundamental legal contours for us. Defendants claim that only their shrunken regulatory record matters; *Levine's* more extensive record underscores how fact specific and fact-intensive the issue is. In our Opposition, we identified the many factual disputes about what the FDA has said, has done and would do if presented with a well-supported CBE. The inquiry is necessarily a factual one, with legal underpinnings as laid out in *Levine.*

California law defines when an "issue of fact arises" from the pleadings, *C.C.P.* § 589, and since Defendants' answers controvert the complaints' allegation that Defendants have a duty to warn, we have a true fact issue, to be tried by jury. This is true whether the stakes are high or low;[11] *Levine* explains that state tort claims, traditionally decided by juries, are an essential element of drug safety. *And see C.C.P.* §592 (also permitting the Court "to order any such issue to be tried by a jury.") Thus, while we contend that the fact-finding necessary to resolve this issue is properly a function of the jury, were the Court to conclude otherwise, it may still permit a jury to try the issue.

3. CONCLUSION

On this motion, it is for the Court to decide whether Defendants have satisfied their burden of producing clear evidence of impossibility, and only if so, whether Plaintiffs have then met their counterpart burden to show a dispute as to a material issue of fact. Of course, the Court may assess the sufficiency of the undisputed evidence to determine whether it supplies clear evidence of impossibility. But once this Court concludes that Defendants have not carried their steep burden on this demanding defense, or that Plaintiffs have satisfied their responding burden, the fact-finding to determine whether the FDA has made it impossible to enhance a warning is for another day.

Dated: October 8, 2015

ENGSTROM, LIPSCOMB & LACK

By: _____
BRIAN D. DEPEW
ELIZABETH L. CROOKE
Attorneys for Plaintiffs

[10] *Fosamax, supra*, 951 F.Supp.2d at 703, quoting *Dobbs, supra,* 797 F.Supp.2d at 1270.
[11] Defendants appear to argue that *Dowhal v. SmithKline Beecham Consumer Healthcare* (2004) 32 Cal.4th 910 trumps fact-finding to prevent a jury from "second-guessing" a regulatory decision – we propose to do no such thing, as the decision here is for the manufacturer to warn, not the FDA.

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PROOF OF SERVICE

I, Linda Stark, the undersigned, hereby declare as follows:

1. I am over the age of 18 years and am not a party to the within cause. I am employed by Engstrom, Lipscomb & Lack in the City of Los Angeles, State of California.

2. My business address is 10100 Santa Monica Boulevard, 12th Floor, Los Angeles, California 90067-4113.

3. On **October 8, 2015**, I served a copy of the attached document:

PLAINTIFFS' REPLY TO DEFENDANTS' RESPONSE TO REQUEST FOR ADDITIONAL BRIEFING ON THE ISSUE OF PREEMPTION

X By Electronic Service: Pursuant to Revised Court Order establishing case website and authorizing electronic service of documents, dated October 5, 2009, this document has been electronically served and shall be deemed served as of the date and time it is posted by FileN ServeXpress (formerly known as LexisNexis File & Serve) on its website: www.fileandservexpress.com.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on **October 8, 2015**, at Los Angeles, California.

Linda Stark

LINDA STARK